APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 75-6521

DONALD ABNEY, LARRY STARKS
and ALONZO ROBINSON,
Petitioners,

—v.—

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 5, 1976
CERTIORARI GRANTED JUNE 14, 1976

IN THE

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 74-133

Docket Number and Date	Proceedings

5, March 14, 1974 Letter to clerk that indictment be unsealed, etc., filed

June 18, 1974 through July 2, 1974 Crim. Jury Trial: Jury called and sworn

150, June 5, 1975 Petition of Larry Starks to Dismiss Indictment for failure to Charge a Federal Offense and Lack of Jurisdiction in that the indictment is vague and insufficient and Memorandum of Law thereof, filed

151, June 5, 1975 Petition of Larry Starks to Dismiss and/or Quash the Bills of Indictment and Memorandum of Law thereof, filed

152, June 5, 1975 Petition of Larry Starks to Dismiss Indictment—Double Jeopardy, filed

159, June 16, 1975 Govt's answer to deft., Larry Stark's motion for discovery and inspection, bill of particulars, dismissal of the indictment, suppression of evidence and appropriate relief, certificate of service, filed.

162, August 13, 1975 Deft. Abney's Motion to Dismiss Indictment and in Arrest of Judgment and Memorandum of Law in support thereof, filed.

164, August 21, 1975 Govt's answer to deft., Abney's motion to dismiss indictment, filed.

166, August 21, 1975 Deft., Larry Stark's brief in support of his petition to dismiss indictment-double jeopardy violation of fifth amendment to the U.S. Constitution, filed.

Docket Number and Date	Proceedings
167, August 28, 1975	Defts., Larry Starks and Alonzo Robinson's motion to dismiss indictment memorandum of law, filed.
September 2, 1975	Criminal trial: all outstanding motions: all motions denied; all deft waive right to a speedy trial; all defts. to appeal; trial stayed pending decision of court of appeals; J. Slomsky appointed to represent Mr. Abney for appeal. bail cont'd.
180, October 1, 1975	Transcripts of 9/2/75, filed
184, January 29, 1976	Order re: Defendants' motion to dismiss the indictment on the grounds that the indictment subjects defendants to double jeopardy etc., are all severally and jointly DENIED and DISMISSED, filed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CONSOLIDATED CASES NUMBERED 75-2071
2072
2073

Date	Proceedings
October 6, 1975	Stipulation of counsel for appellants for consolidation pursuant to Rule 3(b), F.R.A.P., filed. (4 cc.). Certificate of service attached.
November 5, 1975	Brief for appellants and appendix filed. (4 cc.).
December 8, 1975	Brief for appellee, rec'd December 15, 1975, filed. Certificate of service by mail on December 8, 1975 appears on Page 24 of brief.

Date	Proceedings
January 29, 1976	Reply brief for appellants received for the information of the Court. (5 cc) Service by mail on January 28, 1976 attached.
February 4, 1976	Certified copy of order dated January 29, 1976 (Van Artsdalen, D.J.) severally and jointly denying and dismissing, nunc pro tunc, effective as of September 2, 1975, defendants' motions to dismiss the indictment on the grounds that the indictment subjects defendants to double jeopardy in violation of the Fifth Amendment to the United States Constitution, that the indictment fails to comply with Federal Rule of Criminal Procedure 7(c)(1), and that the indictment fails to state a federal offense, rec'd from C. of D.C., filed.
February 9, 1976	Submitted on briefs. Coram: Aldisert, Gibbons and Rosenn, C.J.
February 10, 1976	Judgment order (*Aldisert*, Gibbons and Rosenn, C.J.) affirming the judgment of the district court, filed.
February 24, 1976	Petition for rehearing in banc by appellants, filed. (4cc—6 add'l cc rec'd. 2/26/76). Service attached.
March 5, 1976	Order (Seitz, Ch. J., Van Dusen, *Aldisert*, Adams, Gibbons, Rosenn, Hunter, Weis and Garth, C.J.) denying petition for rehearing in banc by appellants, filed.
March 10, 1976	Motion by appellants for stay of mandate pending application to U.S.S.C. for certiorari, filed. (4cc) Service attached.
March 16, 1976	Order (*Aldisert*, C.J.) staying the issuance of the mandate until April 4, 1976, filed.
April 12, 1976	Notice of filing on April 5, 1976, of petition for writ of certiorari, received from Clerk of Supreme Court, filed. (S.C. No. 75-6521)

Date	Proceedings
June 21, 1976	Certified copy of order dated June 14, 1976 granting petition for writ of certiorari, and granting motion to proceed in forma pauperis received from Clerk of S.C. filed. (S.C. No. 75-6521)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 74-133

UNITED STATES OF AMERICA

v.

LARRY STARKS, CLARENCE L. STARKS, ALONZO ROBINSON, DONALD E. ABNEY, MERRILL A. FERGUSON

INDICTMENT

The indictment in this case as set forth at 515 F.2d 112, 115 at footnote 2, states:

"That from on or about the 8th day of December 1973, to on or about the 21st day of February, 1974, inclusive, at Nookies's Tavern, located at 6301 Wister Street, Philadelphia, Pennsylvania, and the area adjacent to said tavern, in the Eastern District of Pennsylvania, and within the jurisdiction of this Court, Larry Starks, Clarence Louis Starks, Alonzo Robinson, Donald Everett Abney, and Merrill Albert Ferguson, did unlawfully and willfully conspire and attempt to obstruct, delay and affect commerce, as that term is defined in and by Section 1951, Title 18, United States Code, to wit, interstate commerce, and the movement of articles and commodities in such commerce by extortion, as that term is defined in and by Section 1951, Title 18, United States Code, that is to say, by then and there attempting to obtain from another, to wit, one Ulysses J. Rice, then doing business under the name, style and description of Nookie's Tavern, and then engaged in the sale of alcoholic beverages contracted for and obtained in interstate commerce, certain property of said Ulysses J. Rice, to wit, his money in amounts varying from One Hundred Fifty Dollars ($150.00) to Five Hundred Dollars ($500.00) to be paid in order to continue in the business of selling alcoholic beverages contracted for and obtained in interstate com-

merce, the attempted obtaining of said property from said Ulysses J. Rice as aforesaid being then intended to be accomplished with the consent of said Ulysses J. Rice induced and obtained by the wrongful use to wit for the purpose aforesaid, of actual and threatened force, violence and fear made to said Ulysses J. Rice.

In violation of Section 1951 of Title 18, United States Code."

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 74-133

(Title Omitted in Printing)

EXCERPTS FROM TRANSCRIPT OF PRE-TRIAL CONFERENCE IN CHAMBERS

June 14, 1974

Before HON. DONALD W. VAN ARTSDALEN, J.

(Appearances Omitted in Printing)

* * * *

[37] MR. CARROLL: On this matter of the indictment that was raised by Mr. Myers, I just want to make perfectly clear, Your Honor, our position in addition to all other [38] positions that have been taken on this.

When the motion to dismiss the indictment was argued in this case my recollection is that Mr. Slomsky, took the position that the conspiracy count and the contempt count should not be joined in a single count in the indictment. I believe I joined in that position.

My recollection, although perhaps my recollection is faulty, is that Your Honor indicated that perhaps a motion to elect would be the proper procedural means to raise this question, that is a motion to force the Government to elect between an attempt and conspiracy.

When I received Your Honor's order dated June 4, 1974, in Paragraph 1 of the Bill of Particulars, I took that to mean that Your Honor had changed your mind concerning the election, because what Your Honor has said there is that the Government shall file a Bill of Particulars as to whether the Government intends to prove either a conspiracy or an attempt, or both.

Now, the way the Government has responded to Your Honor's order is indeed to take the position that they were going to prove both.

Do I correctly assume that Your Honor's order of June 4 is a denial of our motion for election?

THE COURT: You do not correctly so assume.

I simply asked the Government to state what [39] its position was. The Government in its Bill of Particulars has stated what its position is.

It is up to defense counsel, it seems to me, to raise any objection that they wish to that either at the time of trial or at such other time as defense counsel think is appropriate.

MR. MYERS: I am raising my objection, as I have, to the election in the manner in which they have stated.

MR. CARROLL: I specifically move that they be compelled to elect so that there is no ambiguity in this.

MR. MYERS: I join in that.

MR. MOZENTER: I join in that.

THE COURT: You oppose that motion?

MR. BRAVO: Yes, Your Honor.

THE COURT: All right. Those motions are denied.

Is there anything further, gentlemen, that we can do at this time?

(No response.)

Thank you very much.

(Concluded at 2 o'clock P. M.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 74-133

(Title Omitted in Printing)

EXCERPTS FROM TRANSCRIPT OF TRIAL
Philadelphia, Pa., June 27, 1974

Before HON. DONALD W. VAN ARTSDALEN, J.,
(and a Jury)

EIGHTH DAY

(Appearances Omitted in Printing)

* * * *

[8-145] THE COURT: Does anyone have any further motions?

I think you indicated that you had, Mr. Carroll.

MR. CARROLL: If Your Honor please, this again perhaps runs rather close to your charge but I would like to just put it on the record at this time.

[8-146] I again renew our motions to elect, to compel the Government to elect between attempt and conspiracy now that the defense has closed their case.

If Your Honor is not inclined to grant that motion, I am going to request, and I have not discussed this with cocounsel as to their positions in this matter, but I am going to request that Your Honor follow the procedure that has been followed in some cases, and in particular the case of the United States v. Varelli, Seventh Circuit, 1969 case, concerning directions to the jury to marshal evidence in a conspiracy prosecution. That is to say that I am going to request the Court at the ap-

propriate time to actually direct the jury what pieces of evidence are admissible against which defendants on which particular aspect of this one-count indictment.

As I have previously indicated to the Court, I think it is going to be a herculean job for perhaps both the Court and for the jury to segregate out these various pieces of evidence. But I think that on the posture of this case as it exists now, particularly since Your Honor did read the transcript yesterday concerning the witness Marie Reichardt's testimony about my client Alonzo Robinson, it becomes increasingly evident that the only link between what we refer to as these two conspiracies is an out-of-court statement by Larry Starks.

[8-147] In any event, sir, I first move for election, and in the event that is denied then I move for marshal of proof in accordance with the Varelli case.

THE COURT: Does the Government oppose that move for election?

MR. BRAVO: Yes, we do, Your Honor.

THE COURT: That motion will be denied.

These other matters we will discuss at conference.

MR. SLOMSKY: Just one thing on the record.

Mr. Carroll said he had not discussed it with other counsel. I would join in with Mr. Carroll's request.

THE COURT: All right.

Gentlemen, we will recess this case until 9:45 tomorrow morning, bearing in mind that if you are involved in some other case, you are, that's all.

MR. MYERS: I would agree with the Government. I would like to know before tomorrow, and I have presented no defense based on my understanding that I would have last speech.

THE COURT: We will discuss that in conference.

MR. MYERS: All right.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 74-133

(Title Omitted in Printing)

EXCERPTS FROM TRANSCRIPT OF TRIAL
Philadelphia, Pa., July 1, 1974

Before HON. DONALD W. VAN ARTSDALE, J.,
(and a jury)

TENTH DAY

(Appearances Omitted in Printing)

[10-3] CHARGE OF THE COURT

VAN ARTSDALEN, J.

Good morning, members of the jury and counsel. I hope that all of you had a pleasant weekend.

Members of the jury, it is now my province to instruct you as to the law that you are to apply in reaching your verdict. How you proceed when you start your deliberations and during your deliberations is really a matter that is entirely up to you. One of you should be appointed as the foreman or the forelady, the duty of such foreman or forelady being to announce the verdict when and if a verdict is rendered, and also to act as your spokesman both during your deliberations and at any other time that it might become necessary during your deliberations, if any, to communicate with the Court.

Ordinarily the number 1 juror acts as the foreman or the forelady, unless someone else is particularly well

qualified, or for any other reason that you the jurors may determine that you wish to have someone else act in that capacity.

The instructions that I am going to give you are instructions as to the law only that should be applied in this case. That is to say that the determination of the facts, as all counsel have pointed out to you repeatedly, is a matter that is entirely up to you, the jury.

[10-4] In these instructions I will refer very little if at all to the facts of the case. I do not intend to express any opinion to the jury as to the facts, and I don't want the jury to interpret anything I say as expressing any opinion as to the facts of this case, or as to any particular verdict which the jury may bring in. That is your task and your task alone to reach the verdict, and you should be wholly uninfluenced about what other persons might think or what other persons might do were they in your position.

Obviously, I can't give you all of the instructions at any one time, and I have to give some first and some later. Some of the instructions may be a little bit more complicated and may take a little longer than others to explain. I want you to bear in mind, however, that all instructions are important and no one instruction is to be considered of any greater or lesser importance or significance than any other instruction. All instructions must be considered in reaching your verdict.

Again, as all counsel have told you, you must accept the statements of law that I give to you; you must apply the principles of law as I explain them to you in reaching your verdict. This is true irrespective of whether or not you agree that that is what the law is, or whether you agree that that is what the law ought to be, or whether you think it is fair and just and reasonable. The reason for this is because [10-5] all cases and issues involving the same legal issues must be decided by the same rules of law, although different law may, of course, be applicable in different factual situations and in different cases.

Counsel have also correctly pointed out to you many times that it is the duty of you the jury collectively to recall all of the testimony and all of the evidence in the case. And if the attorneys in their arguments, either in

their opening or closing, misstated any facts to you, or if in these instructions I should refer to any facts or the testimony which disagrees with your individual and your collective recollections of the testimony and the evidence, accept your own recollections and not that of mine or of counsel.

Also I would point out that opinions of counsel as to what your verdict should be are in no way to be considered as evidence.

Arguments of counsel to the jury are to assist you in analyzing the case and in reaching a proper verdict.

Justice through trial by jury must always depend upon the willingness of each and every one of you as individual jurors to find the truth as to the facts from the evidence presented, and to arrive at a verdict by applying the law as given in the instructions by the trial judge.

As I am sure is obvious to all of you, you are [10-6] to determine this case based on the testimony and the evidence, and solely on that. You are to reach your decision without any bias or prejudice, sympathy or other purely emotional reaction towards, for or against any party, witness, counsel or anyone else involved in the case.

The law does not permit you to be governed by sympathy, prejudice, public opinion or emotion.

In other words, in determining this case look at it purely objectively, determine what the facts are and then apply the law as I inform you the law to be, and come to your decision and your verdict irrespective of any emotional reaction or impulse that you may have towards the case.

I say to you further that you are not to be concerned with the effect that your verdict may have upon anyone, regardless of what that verdict may be. Any verdict which you return must be a unanimous verdict, that is to say all 12 of you must in good conscience agree with the verdict that has been returned.

Counsel have mentioned to you repeatedly, and I believe that I have informed you when you were being selected, that the law presumes a defendant, and in this case all defendants, to be innocent of crime.

In this case all defendants on trial come into court with what is called a clean slate, presumed to be innocent, and that presumption remains with them throughout [10-7] the trial of this case until and unless you find beyond a reasonable doubt from all of the evidence that the defendants, or any one or more of them, is or are guilty beyond a reasonable doubt. And until and unless you are so satisfied, the presumption of innocence will remain. And in that event it will be your duty to acquit such defendant or defendants as to whom you have a reasonable doubt.

The presumption of innocence applies to each defendant, and should you find that as to one or more defendants the Government has overcome that presumption of innocence by proof from the evidence of guilt beyond a reasonable doubt, the presumption of innocence will nevertheless remain as to all other defendants as to whom there is not proof from the evidence of guilt beyond a reasonable doubt.

The presumption of the defendants' innocence is not an idle phrase to be taken lightly by the jury. Every juror is bound to entertain a conscientious, sincere and ungrudging, without any mental reservations or evasion whatever, and to give all defendants the full benefit of it. It is an important right belonging to every person accused of a crime and such presumption of innocence continues throughout the trial until it is overcome by evidence, and evidence alone to the exclusion of all reasonable doubt on the part of each and every member of the jury.

The defendants, although accused by the indictment [10-8] which is the formal charge that will go out with you so that you may read it, begin the trial with a clean slate and with no evidence against them. The law permits nothing but legal evidence to be presented before the jury or to be considered by the jury in reaching its verdict, and it is for that reason that in this case there were many conferences that were held in your absence, many things that had to be decided in your absence, not because counsel nor I wish to keep from you any relevant or proper facts for you to consider, but simply because under the law there is certain evidence that is permitted and certain types of things that are not permitted to be presented to a jury. And this is so that the jury can decide the case solely on competent legal evidence.

The presumption of innocence alone requires a jury to acquit a defendant unless the jury is satisfied beyond a reasonable doubt of guilt after a careful and impartial consideration of all of the evidence in the case.

It therefore becomes necessary for me to define to you what is meant in the law by "reasonable doubt." It is somewhat self-explanatory.

A reasonable doubt is a fair doubt based upon reason and common sense, and arising out of the evidence or lack of evidence. It is obviously rarely possible to prove anything to an absolute certainty or beyond all possible doubt. Proof beyond a reasonable doubt is such proof as you [10-9] would be willing to rely upon and unhesitatingly act upon in matters of the greatest importance in your own affairs. No defendant can be convicted on mere whim, suspicion, guess or conjecture. Guilt may only be founded upon solid, convincing evidence as leaves no reasonable doubt of guilt.

As I have indicated, a reasonable doubt may arise not only from the evidence produced but also from a lack of evidence. Since the burden of proof is always upon the Government, that is the prosecution, to prove an accused guilty beyond a reasonable doubt, it is necessary to prove every essential element of the crime charged beyond a reasonable doubt, and all defendants have the right to rely upon the failure of the prosecution to establish such proof. In other words, no defendant is ever required to prove anything, and no defendant has the burden of proving anything. The burden is that solely of the Government and remains that of the Government throughout the trial of the case.

A defendant may also rely upon evidence brought out on cross-examination of witnesses called by the prosecution.

A reasonable doubt means in the law just what the word implies, namely, a doubt founded upon reason. It must not arise solely from a merciful disposition or a kindly or sympathetic feeling, or the possible desire to avoid what might be regarded by some as a disagreeable duty. It must [10-10] not be a mere whim or a vague conjectural doubt or a misgiving founded upon mere guess or speculation. It must be an honest doubt, such as would make an honest, sensible and fair-minded person hesitate to act in a most serious and important matter wherein ascertainment of the truth was conscientiously being sought.

It is sometimes said that to prove something beyond a reasonable doubt means to prove it to a moral certainty. Proof beyond a reasonable doubt must therefore be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

If the jury in this case should view the evidence as reasonably permitting either of two conclusions, one of innocence and the other of guilt, as to any particular defendant, the jury must adopt the conclusion as to that defendant or defendants of innocence, and render a verdict of not guilty or a verdict of acquittal as to that defendant or defendants.

This case arises upon an indictment which is, as I have said, merely a formal method of accusing the defendant of a crime and bringing him before a jury. It is not evidence of any kind against the accused and it creates no presumption nor does it permit any inference of guilt.

I have told you that your decision must be [10-11] based solely upon the evidence in the case. Therefore, it becomes essential that you understand what we mean by evidence.

One type of evidence is what we call direct evidence, such as the testimony of an eyewitness.

In this case most if not all of Mr. Rice's testimony will be called direct testimony or direct evidence.

The other type of evidence is called circumstantial evidence, that is reasonable inferences gleaned from other evidence. It is proof by a chain of proved facts, the circumstances of which point to the conclusion of the commission of an offense.

As a general rule, the law makes no distinction between direct or circumstantial evidence but simply requires before convicting any defendant the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all of the evidence, both direct and circumstantial. However, if a case is based primarily on circumstantial evidence, each fact essential to complete those circumstances leading towards guilt must be proved beyond a reasonable doubt. Proof of guilt by circumstantial evidence must not only be consistent with guilt but it must be inconsistent with innocence before a jury could convict on circumstantial evidence alone.

Unless you have been or are hereafter otherwise instructed, evidence consists of the sworn testimony of the witnesses under oath, regardless of by whom those [10-12] witnesses may have been called, regardless of whether the testimony was brought out on what we call direct testimony, that is in response to questions put to the witness by the party who called the witness, or whether on cross-examination, which I am sure all of you understand means when the other side asks questions of the witness.

It also includes the exhibits that were offered and received into evidence, some or all of which will go out with you when you deliberate upon the case.

Evidence consists of those factors which I have just described to you, irrespective of whether they were produced by the prosecution or by a defendant, and whether on direct or cross-examination. Throughout the course of the trial in this case there have, of course, as in all trials, been various objections made to questions or answers that have been given to questions, and I have previously indicated to you the reason for that. But I would like to review that again for you briefly.

I would say to you that it is the duty of counsel to object to testimony which counsel in good faith feels is not proper for a jury to hear or to consider. And, as I have indicated, where an objection is made, I as the trial judge am required to rule on that objection. You are in

no way to be influenced by the rulings that I have made on objections other than any specific instructions that I may have [10-13] given to you at the time that the rulings were made. In other words, obviously, it makes no difference to the consideration of the jury which side made the most number of objections or which side's objections I may have sustained more times than any other side, or my manner in ruling upon any objections. Those types of considerations would be completely improper.

However, as to any evidence or any answers or questions that I directed should be stricken or disregarded by the jury, the jury must entirely disregard in reaching its conclusion.

Also, if an objection was made to a question and that objection was sustained, it would, of course, be entirely improper for the jury to speculate as to what answer might have been given had that answer been permitted.

And additionally as to any question to which an objection was sustained, the jury may draw no inference from the wording of the question itself or speculate as to what would have been said or what answer would have been given.

I would point out that the questions that are asked by counsel are not evidence, but rather the answers that are given by the witness on the witness stand. Anything that you may have seen or heard outside of the courtroom, whether prior to or during the course of this trial, is not evidence and it must be disregarded by the jury entirely in reaching its decision.

[10-14] No jury should discuss anything other than the evidence produced so far as the facts of this case are concerned. So, as I have indicated, you are to consider only the evidence in the case but in considering that evidence you are not limited simply to the bald or the literal statements of the witnesses on the witness stand, nor solely to the exhibits. You are permitted under the law to draw from the facts which you find have been proved such reasonable inferences as seem to you justified in the light of your experience. You are to take with you your good common sense as reasonable ladies and gentlemen in determining what the facts are. You are, in other

words, to use your common sense in analyzing the testimony and the evidence and in reaching your ultimate decision.

I have mentioned to you the word "inference." An inference is a deduction or a conclusion which reason and common sense leads you to draw from those facts which have been established and proved by other evidence in the case.

In the course of this trial there has been reference to the credibility of witnesses, and all counsel have argued extensively to you on the question of the credibility of witnesses. This is always a matter of great importance to a jury in reaching its decision, especially where there is a dispute as to the facts, or where all witnesses do not agree as to those facts. Because in this case to a large extent the [10-15] prosecution's or the Government's case depends upon the testimony of Mr. Rice, his credibility is, of course, of crucial importance to you. By credibility of witnesses, we mean the accuracy of the testimony given by the witnesses on the witness stand under oath as to those matters that are material to the issues in the case.

You should carefully scrutinize all of the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief, and whether that witness is accurate in the testimony he or she gives. You may consider the apparent intelligence of the witness, the motive, if any, of the witness, the state of mind, the demeanor and the manner while testifying on the witness stand. Consider also the witness's ability to see, observe, know and relate to you those matters about which he or she testifies, and whether he or she impresses you as having an accurate and honest recollection in the matters about which testimony is given.

You may also consider the possible interest of any witness in the outcome of the case. This is not to say, however, that because a witness may be interested in the outcome of the case that his or her testimony is any more or any less trustworthy than any other testimony, but it is a matter which the jury has the right to consider.

[10-16] If there are inconsistencies or discrepancies in the testimony of any particular witness, or between the testimony of different witnesses, that should also be taken into consideration by the jury in determining what testimony to accept and what to reject.

Evidence that at some other time a witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's testimony at the trial may be considered by the jury for the sole purpose of judging the credibility of the witness, but it may never be considered as evidence or proof of the truth of any statement made by the witness out of court.

Two or more witnesses to a particular incident or transaction may see and hear it differently, and they may honestly not fully remember the incident due to a failure of recollection. In weighing the effect of a discrepancy, if you find any, always consider whether it pertains to a matter of importance or is some unimportant detail; and also whether that discrepancy arises from an innocent mistake or whether it comes from an intentional falsehood.

There is a principal of law that if a jury finds any witness has been deliberately and intentionally false about any material part of his or her testimony, the jury has the right, if it wishes do so, to disregard that witness's testimony in its entirety. However, a jury is never required [10-17] to do that. The jury can give such witness's testimony the weight that the jury feels it deserves because it is entirely possible that a witness may be deliberately and intentionally false about some material part of his testimony and yet all together accurate and truthful about other parts of his testimony, and it is after all the duty and the job of the jury to find out what the true facts are. Therefore, the weight of the evidence that you give to the testimony of such a witness, and of all witnesses, is entirely up to you.

The Government is never required to call all possible witnesses who may have some knowledge of the case or who might be reasonably expected to corroborate, that is to verify testimony of other witnesses if called to testify. However, in determining whether the Government

has proved a defendant guilty beyond a reasonable doubt the jury may consider whether testimony was corroborated where corroboration was apparently available.

As I have indicated to you, a reasonable doubt may arise both out of evidence or lack of evidence. Therefore, ladies and gentlemen, the question of what witnesses you are going to believe, the extent to which you are going to believe them, the credence that you are going to give to the testimony of the witnesses, the weight, if you want to call it weight, that you are going to give each witness's testimony is a matter that is entirely up to you. It is an important matter [10-18] for you to determine. But after considering all of the testimony, you should then determine the actual facts as to what happened in this case.

Credibility is, of course, important because the Government must establish guilt beyond a reasonable doubt based upon competent, credible evidence. In judging credibility of witnesses you may and you should apply those everyday tests that one normally utilizes when conscientiously seeking out the truth in matters of importance.

I have indicated to you that the law never imposes any burden on the accused, and the accused need do nothing and need prove nothing. And I would specifically and expressly call attention to the jury that the law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn from the failure of a defendant to testify.

In every crime there must be a joinder of both an act and a criminal intent, and the burden is always on the prosecution to prove both the criminal act and the specific intent beyond a reasonable doubt. And, therefore, we say that a person must unlawfully, wilfully and knowingly act and do the criminal act charged before he may be convicted of a crime.

Therefore, I would like to define to you what [10-19] we mean by "unlawfully, wilfully and knowingly" as meant in the law.

Unlawfully means contrary to law, in violation of the law. To do an act unlawfully means to do wilfully something which is contrary to law.

An act is done wilfully if done voluntarily and intentionally, and with a specific intent to do something that the law forbids, that is to say with a bad purpose either to disobey or to violate the law.

A person who knowingly does an act which the law forbids, intending with bad purpose either to violate or disobey the law, may be found to act with an unlawful intent. An act or a failure to act is knowingly done if done voluntarily and intentionally, and not because of mistake, accident or other innocent reason.

Specific intent to violate or disobey the law or to do that which the law forbids may be proved by direct or by circumstantial evidence. In some instances, and indeed in many cases intent can only be shown by circumstantial evidence because the question of a person's intent is what that person is thinking, what his mental processes are.

Often there is no way of knowing directly what a person may think or what his intentions may be. As a general rule, it is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly [10-20] done and a jury may draw the inference and find that a person intends all of the natural and probable consequences which one standing in like circumstances, possessing like knowledge should reasonably have expected to result from an act knowingly done or knowingly omitted to be done.

Members of the jury, there are, as you know, presently on trial before you five defendants. It is your duty to give separate, individual, personal consideration to the case and the charge against each individual defendant. When you do so you should analyze what the evidence in the case shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants. Each defendant is entitled to have his case determined from the evidence as to his own acts and statements and

conduct and any other evidence in the case which may be applicable to him.

Now we will come to the specific charges in this case.

The indictment has been read to you but I am going to read it to you again. It charges as follows—and this copy of the indictment will go out with you:

That from or about the 8th day of December, 1973, to on or about the 21st day of February, 1974, inclusive, at Nookie's Tavern, located at 6301 Wister Street, Philadelphia, Pennsylvania, and the area adjacent to said tavern, in the [10-21] Eastern District of Pennsylvania, and within the jurisdiction of this court, Larry Starks, Clarence Lewis Starks, Alonzo Robinson, Donald Everett Abney, and Merrill Albert Ferguson, did unlawfully and wilfully conspire and attempt to obstruct, delay and affect commerce, as that term is defined in and by a section of the statute, to wit, interstate commerce, and the movement of articles and commodities in such commerce by extortion, as that term is defined in the Act, that is to say, by then and there attempting to obtain from another, to wit, one Ulysses J. Rice, then doing business under the name, style and description of Nookie's Tavern, and then engaged in the sale of alcoholic beverages contracted for and obtained in interstate commerce, certain property of the said Ulysses J. Rice, to wit, his money in amounts varying from $150 to $500 to be paid in order to continue in the business of selling alcoholic beverages contracted for and obtained in interstate commerce, the attempted obtaining of said property from said Ulysses J. Rice as aforesaid being then intended to be accomplished with the consent of said Ulysses J. Rice, induced and obtained by the wrongful use, to wit, the use for the purpose aforesaid, of actual and threatened force, violence and fear made to said Ulysses J. Rice. In violation of the statute.

Members of the jury, it is necessary for me therefore to define to you what specifically is charged in this [10-22] indictment.

The indictment is drawn pursuant to a federal statute, that is a law of the United States that was enacted by

Congress. That law in its parts that are pertinent to this case are as follows. The act or the statute says:

Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce by extortion, or attempts or conspires so to do, or threatens physical violence to any person or property in furtherance of a plan or a purpose to do anything in violation of this Act, is guilty of an offense against the United States.

The statute or the Act further goes on to say and to define:

As used in this section, the term "extortion," means the obtaining of property from another with his consent induced by the wrongful use of actual or threatened force, violence and fear.

The Act further provides: The term "commerce" means all commerce between any point in a state and any point outside thereof.

You will note, ladies and gentlemen, that the statute is written in broad language. Its purpose is to make unlawful all interference with interstate commerce by extortion. Attempts and conspiracies to interfere with [10-23] interstate commerce by extortion are made unlawful as well as the substantive offense of actual interference with interstate commerce by extortion.

By interference with interstate commerce, I mean obstruction, delay or harmful effect upon interstate commerce in any way or degree by extortion.

Interstate commerce means the commercial transportation of goods and merchandise, and articles and commodities from one state to another. That is the movement of goods and commodities in commerce between and among different states of the United States.

There is testimony from which the jury could find some of the liquor which Mr. Rice purchased for retail sale in his bar or taproom was distilled, processed or bottled outside of Pennsylvania and in states other than Pennsylvania, and was transported into Pennsylvania where it was purchased and warehoused by the State of Pennsylvania or one of its agencies, I believe it was the State

Liqour Control Board, for sale and wholesale to taproom owners, including Mr. Rice.

It is not essential that the Government in this case prove the total volume or the amount or the proportionate amount of such liquor or the value thereof that may have been involved in interstate commerce, or that was purchased from outside of Pennsylvania. If you find beyond a reasonable doubt that some of the liquor that was purchased by Mr. Rice [10-24] was originally distilled, processed or bottled outside of Pennsylvania and was transported into Pennsylvania as a regular part of commerce, whether that transportation was by truck, railroad or other means of transportation, and that it was sold and delivered to Mr. Rice as a continuous part of the distributive chain in rea ng the ultimate consumer from the distiller, bottler or processor, you could properly find that such liquor was a part of interstate commerce and that such liquor constituted articles and commodities traveling in interstate commerce.

In addition to the requirement that the Government in order to prove the so-called substantive offense of interference with interstate commerce by extortion, must prove beyond a reasonable doubt that some of the liquor purchased by Mr. Rice was involved in or a part of interstate commerce, the Government would have to further prove beyond a reasonable doubt that such interstate commerce, that is the interstate transportation of such liquor, was in some way or degree obstructed, delayed or adversely or harmfully affected by the extortion.

Mr. Rice has testified that his business declined during the late fall of 1973 and early 1974. If you find beyond a reasonable doubt that there was a loss of business which was caused by a conspiracy and attempt to extort money from Mr. Rice, then you could find beyond a reasonable doubt that interstate [10-25] commerce was in fact obstructed, delayed and adversely affected, provided some of the liquor which Mr. Rice bought was found to be involved in interstate commerce.

However, the defendants are charged not with the so-called substantive offense itself but rather with a conspiracy and attempt to obstruct, delay and affect inter-

state commerce by extortion. If the jury should find beyond a reasonable doubt that there was a conspiracy and an attempt to extort money from Mr. Rice, the natural and probable consequences of which conspiracy and attempt, if successfully carried out, would be to obstruct, delay and adversely affect interstate commerce in any way or degree, the offense charged in the indictment of conspiracy and attempt would be complete, and the jury could properly convict all defendants found beyond a reasonable doubt to be members of the conspiracy and attempt.

In other words, actual obstruction, delay or harmful effect on interstate commerce need not be proved provided the Government proves beyond a reasonable doubt that the natural and probable consequences of the conspiracy and attempt to extort money from Mr. Rice, if carried to successful conclusion, would be to obstruct, delay and adversely affect interstate commerce in any way or degree.

Obviously, it becomes necessary for me to define both "conspiracy" and "attempt," since the defendants [10-26] are charged not with the substantive offense itself of obstructing, delaying or adversely affecting interstate commerce by extortion but rather a conspiracy and attempt so to do.

Therefore, I shall define to you all of the requisites of both a conspiracy and an attempt, because all of these requisites must be found before the jury could find any defendant guilty.

A conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose by unlawful means.

So a conspiracy is a kind of partnership in criminal purpose in which each member becomes the agent of every other member. The gist of the offense is a combination or agreement to disobey or violate the law. Mere similarity of conduct among various persons, and the fact that they may have associated with each other and may have assembled together and discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy.

However, the evidence in the case need not show that the members entered into any express or formal agreement, or that they directly by word spoken or in writing stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the [10-27] object or purpose was to be accomplished. What the evidence in the case must show beyond a reasonable doubt in order to establish proof that a conspiracy existed is that the members in some way or manner, or through some contrivance positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan or scheme.

The evidence in the case need not establish that all of the means or methods set forth in the indictment were agreed upon to carry out the alleged conspiracy, nor that all means or methods which were agreed upon were actually used or put into operation, nor that all of the persons charged to have been members of the alleged conspiracy were such.

What the evidence in the case must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed, and that one or more of the means or methods described in the indictment were agreed upon to be used in an effort to affect or accomplish some object or purpose of the conspiracy as charged in the indictment, and that two or more persons, including one or more of the accused, were knowingly members of the conspiracy as charged in the indictment.

One may become a member of a conspiracy without full knowledge of all of the details of the conspiracy, on the other hand, a person who has no knowledge of a conspiracy but happens to act in a way which furthers some object or purpose of the conspiracy does not thereby become a conspirator. [10-28] Before the jury may find that a defendant or any other person has become a member of a conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed, and that the defendant, or other person who is claimed to have been a member, wilfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

As I have indicated to you previously, to act or participate wilfully means to act or participate voluntarily and intentionally and with a specific intent to do something the law forbids, that is to say, to participate with bad purpose either to disobey or violate the law.

So if a defendant, or any other person, with the understanding of the unlawful character of the plan, knowingly encourages, advises or assists for the purpose of furthering the undertaking or scheme, he thereby becomes a wilful participant and a conspirator.

One who wilfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

In determining whether a conspiracy existed, the jury should consider the actions and declarations of all of the alleged participants. However, in determining whether a particular defendant was a member of the conspiracy, if any, the jury must consider only his acts and statements. He [10-29] canot be bound by the acts or declarations of other participants until it is established that a conspiracy existed and that he was one of its members, established by proof other than the statements of other members of the conspiracy.

Each person charged must be considered separately and individually by the jury. I have indicated to you that mere association alone, among or between two or more persons charged as conspirators or similarity of action does not establish a conspiracy. Mere similarity of conduct among various persons and the fact that they may have been associated with each other and may have been together and discussed common interests does not necessarily establish proof of a conspiracy.

It is, of course, not necessary that the Government prove that each person to the conspiracy knew all of the details, or means or methods to be used, or that he had knowledge of all of the other persons involved in the conspiracy, or that they were all members at the inception, or that they all played important roles.

Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a defendant was one of the members, then the state-

ments thereafter knowingly made and the acts thereafter knowingly done by any person likewise found to be a member may be considered by the jury as evidence in the case as to the defendant found [10-30] to have been a member even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy and in furtherance of some object or purpose of the conspiracy. Otherwise any admission or statement made or act done outside of court by one person may not be considered as evidence against any other person who was not present and did not hear the statement made or see the act done.

Therefore, any statements made by any person found to be a conspirator which were not done in furtherance of the conspiracy, or were made before its existence or after its termination may not be considered as evidence against any other person found beyond a reasonable doubt to be a member of the conspiracy.

In your consideration of the evidence in this case as to the offense of conspiracy charged, you should first determine whether or not the conspiracy existed as alleged in the indictment. If you conclude that the conspiracy did exist you must next determine whether or not the accused wilfully became a member of the conspiracy.

If it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the indictment was wilfully formed, and that the defendant wilfully became a member of the conspiracy either at its [10-31] inception or afterwards, and that thereafter one or more of the conspirators knowingly committed one or more of the overt acts charged in furtherance of some object or purpose of the conspiracy, then there may be a conviction even though the conspirators may not have succeeded in accomplishing their common object or purpose, and in fact may have failed in so doing.

The extent of any defendant's participation moreover is not determinative of his guilt or innocence. A defendant may be convicted as a conspirator even though he may have played only a very minor part in the conspiracy.

An overt act is any act knowingly committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature if considered separately and apart from the conspiracy. It must, however, be an act which follows and tends toward accomplishment of the plan or scheme and must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.

Therefore, there are four essential elements that are required to be proved beyond a reasonable doubt in order to establish the offense of conspiracy charged in this indictment.

First, that the conspiracy described in the indictment was wilfully formed and was existing at or about [10-32] the time alleged in the indictment which is between December 8, 1973 up to and including the 21st of February, 1974.

Second, that the accused wilfully became a member of the conspiracy.

Third, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at or about the time and place alleged.

And, fourth, that such overt act was knowingly done in furtherance of some object or purpose of the conspiracy as charged.

If the jury should find beyond a reasonable doubt from the evidence in this case that existence of the conspiracy charged in the indictment has been proved, and that during the existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy, then proof of the conspiracy offense charged is complete, and it is complete as to every person found by the jury to have been wilfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

A person cannot, of course, conspire with himself and, therefore, you cannot find any defendant guilty unless you find beyond a reasonable doubt that such defendant conspired, as I have defined that term to you, and [10-33]

as charged in the indictment, with at least one other person.

The indictment in this case charges a single overall conspiracy among all five defendants. It is but a single and identical charge as to all defendants. Before you may convict any defendant you must find beyond a reasonable doubt that such defendant was a member of the conspiracy as charged, that is a conspiracy that attempted to obstruct, delay and adversely affect interstate commerce by extortion. Rather I should say that it was a conspiracy and attempt to obstruct, delay and adversely affect interstate commerce by extortion.

If you find beyond a reasonable doubt that there was such a conspiracy formed, and that the conspirators attempted to carry out the unlawful conspiratorial plan and scheme, then any and all of the defendants as to whom you are satisfied beyond a reasonable doubt took part in that conspiracy, you may find guilty as members of that conspiracy. If, of course, you are not satisfied beyond a reasonable doubt that there was a conspiracy as charged in the indictment, all defendants must be acquitted.

To put it another way, if you find there was no conspiracy as charged in the indictment, then obviously no defendant may be found guilty.

If you find that one or more of the defendants did or committed certain acts but were not members of the [10-34] conspiracy charged in the indictment but were in fact members of another separate conspiracy not charged in the indictment, then you must return a verdict of not guilty as to such defendant or defendants whom you find not to be members of the conspiracy charged in the indictment.

There may, of course, be found by the jury to be a single overall conspiracy with different parties joining or leaving the conspiracy at various times.

It is not necessary that the Government prove beyond a reasonable doubt that all of the defendants personally had any direct dealings with Mr. Rice in order to prove the conspiracy charged in the indictment. What must be proved beyond a reasonable doubt is that each defendant found to be a member of the conspiracy charged had some

part in the scheme of things, that each such defendant had some role, large or small, to play in the overall plan and scheme to obstruct, delay and adversely affect interstate commerce by extortion.

I have instructed you that before a person may be found guilty of a charge of conspiracy not only must there be proof beyond a reasonable doubt that such person was a member of the conspiracy charged in the indictment but also that there be proof beyond a reasonable doubt of the commission by one or more of the conspirators of an overt act, that is an act knowingly committed in an effort to accomplish some object or purpose of the conspiracy.

[10-35] In this case the defendants are charged with a conspiracy and attempt, both as integral and essential parts of the single charge.

An attempt to commit an offense requires that a wilful act be done in an effort to bring about or accomplish that which the law forbids to be done, bearing in mind the definition that I have already given to you of wilful. An attempt would, of course, constitute an overt act provided you find that there is a conspiracy, and an attempt to obstruct, delay or adversely affect interstate commerce by extortion.

An attempt requires that there be an affirmative wilful act to accomplish that which the law forbids, which if such act were successfully executed and carried out would constitute all of the essential elements of the substantive offense. Normally, therefore, an attempt is such activity that but for some fortuitous or unforeseen or unanticipated occurrence or event, uncontrolled by the actor, the crime itself would have been complete.

It is, of course, also necessary that you understand clearly what is meant by "extortion" as used in this statute.

The statute defines extortion as the obtaining of property from another with his consent, induced by the wrongful use of actual or threatened force, violence and fear.

There is no evidence in this case whereby the [10-36] jury could find any actual force or violence. It will be for

you the jury to determine whether there was any threatened force or violence.

To extort money by fear means to instill such fear into the mind of another that such person out of fear consents to and does deliver property, in this case money, to or at the direction of the person instilling such fear. The fear may be physical violence to some person or property, or the fear of economic or business loss or harm. It need not be solely fear for one's self or one's own property but may include fear as to any person or any person's property. The fear must, however, be voluntarily and wilfully instilled or induced into the mind of the person being extorted, and for the specific purpose of obtaining, as applicable to this case, money from the person placed in fear, although with his consent.

The fear need not be instilled by any actual force or violence. A threat may exist and be communicated to another even though the language used and literally construed would not amount to a threat. It may be communicated by innuendo from words spoken; direct threatening words need not be used. It may be communicated by a combination of words spoken and a course of conduct on the part of the one who seeks to create the understanding in the mind of another that there is a threat.

[10-37] The term "fear" means a state of anxious concern, alarm or apprehension. The instilling of the fear must also be wrongful.

As to the charges in this case of conspiracy and attempt to interfere with interstate commerce by extortion, there need be no proof of actual fear, provided there is proof beyond a reasonable doubt that part of the plan of the conspiracy was to instill such fear as to accomplish the purpose of the conspiracy. That is to say, to instill such fear as to obtain the money sought to be extorted.

Specifically it need not be proved that in fact Mr. Rice was placed in fear, provided the object and purpose of the conspiracy was to instill such fear into Mr. Rice as to obtain by extortion from Mr. Rice, with his consent, and the effect of which was to delay, obstruct and harmfully affect interstate commerce or the probable consequences of which would be to do so.

Wrongful as used in the statute limits the coverage of the statute to those instances where the obtaining of the property would itself be wrongful because the alleged extortionist has now lawful claim to that property. Extortion requires an intent to obtain that which in justice and equity the party is not entitled to receive. It requires that the demand or threat be unlawful in the sense that there be no legitimate right to make such a demand or threat in order to [10-38] obtain the property extorted, in this case money from Mr. Rice.

There was testimony by Mr. Rice in this case that he was afraid of one of the defendants because of that defendant's reputation.

You may consider that testimony only as to whether or not Mr. Rice was in fact placed in fear. The reputation of that defendant is not otherwise in issue and it may not be considered in any other way.

To be guilty of the offense charged the Government need not prove that the defendant or any defendant personally profited or intended personally to profit or to receive any of the proceeds of the money extorted, provided the money was to be obtained by the wrongful use of threatened force, violence or fear, as I have defined those terms to you.

There has been some testimony about the possible involvement of Mr. Rice in the use and/or the sale or possession of narcotics. This may properly be considered by the jury in determining Mr. Rice's credibility as a witness, and as argued to you by counsel, and in weighing his evidence. However, even if the jury should suspect, believe, or find as a fact that he was a user, possessor, seller or dealer in narcotics, this would in no way permit or justify anyone in conspiring and attempting to obstruct, delay and adversely affect interstate commerce by extorting money from Mr. Rice [10-39] by the wrongful use of threatened force, violence and fear.

The same may be said concerning Mr. Rice's finances and his success or failure as a businessman, except as it may affect his credibility. Also his reputation or whether he is a good man or a bad man has nothing to do with

the charges in this case, except as you may properly consider it in determining his credibility.

Obviously, this charge being a single conspiracy and attempt to obstruct, delay and adversely or harmfully affect interstate commerce by extortion does not require proof that the conspiracy was successful, or that it's unlawful objectives were obtained. The offense charged may be proved even though the conspiracy and attempt failed because the extortion was not successfully carried out.

Now, I would call attention to one other piece of evidence, and that is the tape which you heard. It was permitted into evidence merely to corroborate the oral testimony of Mr. Rice on the witness stand.

If you heard something on the tape said by someone whose voice you did not recognize as that of Mr. Rice, whom you did hear testify in court, you must entirely disregard that unless Mr. Rice himself expressly testified that that person made such a statement, and that he so testified while on the witness stand.

Members of the jury, during the course of the [10-40] trial I have told you not to consult or talk about the case even among yourselves or with anyone outside of the courtroom, but now when the case is given to you, obviously, you should consult with each other, express your views among each other and consider the views of each other, but each of you must decide the case for himself or herself, and to do so only after an impartial consideration of all of the evidence in the case.

Remember that at all times you are not partisans, you are the judges of the facts and your sole duty is to seek out the truth from the evidence and return a verdict in accordance with that as you find it.

Remember also that the question before you is not will the Government win or lose, because I say to you that the Government always wins when justice is done in any particuar case regardless of whether the verdict is guilty or not guilty.

You are concerned only with returning a verdict as to the guilt or innocence of these defendants as to the charge alleged in the indictment, and you have no concern and should not concern yourself or speculate as to what might

transpire thereafter, or what the effect of your verdict may be, whatever that verdict is.

I trust again that you will bear in mind that I am not indicating to you in any way what I think the verdict [10-41] should be or what I think your determination of any of the facts in the case should be. That is a matter that is entirely up to you. You should consider this case against each defendant so that you can return a verdict separately as to each defendant.

And that has concluded the instructions that I want to give to you, but before you finally get the case to consider it, it is necessary and required that I consult with counsel to see if there are other matters about which I should instruct you, and for that purpose I must consult with them. It may take a few minutes, it may be a very short time, it may take a little bit longer.

I will request the jurors to go back to the jury deliberation room but strange as it may seem I still request that you not discuss the facts of the case even now, because there may be something very important that I have omitted or overlooked.

The jury is excused to take a recess now in the jury deliberation room.

(The jury left the courtroom at 11:50 A.M.)

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[10-53] MR. CARROLL: Your Honor, may I enter another exception also to the underlying problem of the con- [10-54] spiracy and attempt, both being charged in the case.

My further objection is that because these two charges are joined in a single count that Your Honor's instructions have become extremely confusing in my opinion to the jury, so that I again ask for an election in this case for the reason that the joinder of those two charges in a single count tends to burden the jury with an excess of legal theory in order to come up with a verdict.

But, number 2—

THE COURT: I would think that it would help the defendants in that they have got to find both conspiracy and attempt.

MR. CARROLL: That was my second point. I understood Your Honor to take that position, that the jury must find as to each defendant both, assuming that there is to be a verdict of guilty, that he was, number 1, a member of a conspiracy, and that, number 2, he was guilty of an act constituting an attempt. But I didn't understand Your Honor to get that across to the jury clearly, that the analysis would be, number 1, was there a conspiracy, number 2, was this defendant a member of that conspiracy, and, number 3, did he commit an act constituting an attempt.

THE COURT: I am not saying that all defendants [10-55] to be guilty must personally have committed an act constituting an attempt.

MR. CARROLL: Even though the indictment alleges—

THE COURT: If they are members of the conspiracy and one of them committed an attempt then, as I see it under this indictment, they could all be found guilty.

MR. CARROLL: You mean on the theory of coconsiprators' liability?

THE COURT: Yes.

MR. CARROLL: I would except to that position, Your Honor.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Title omitted in printing)

PETITION TO DISMISS INDICTMENT—DOUBLE JEOPARDY—
VIOLATION OF FIFTH AMENDMENT OF THE
U. S. CONSTITUTION

The Petitioner, LARRY STARKS, by and through his attorney, Jack E. Myers, Esquire, moves to dismiss the indictment on the grounds of double jeopardy and alleges as follows:

(1) The Petitioner, LARRY STARKS, was arrested on or about February 21, 1974, together with others. He was charged on the within indictment with a violation of Title 18, U.S.C. Sec. 1951.

(2) In one Count, he was charged with two substantive offenses, to wit: Conspiracy and Attempt to Obstruct, Delay and Affect Commerce by Extortion.

(3) Counsel objected to this indictment in that it was totally defective and legally incorrect.

(4) On June 4, 1974, the trial court entered an Order that the Government shall give a statement one week from June 4, 1974, whether the Government intended to proceed to prove either a conspiracy, or an attempt to obstruct, delay and affect commerce and the movement of articles and commodities therein by extortion or both.

(5) The Government elected to try *both* substantive charges in the one count over objection of counsel.

(6) The case was tried before the Hon. Judge Donald W. Van Artsdalen with a jury and Larry Starks was found guilty on July 1, 1974. He received a custodial sentence.

(7) An appeal was perfected to the Circuit Court of Appeals, matter reversed and remanded to the Lower Court.

(8) The verdict in this case has now placed the petitioner, Larry Starks, in jeopardy and such subsequent

prosecution is now barred by the constitutional protection against double jeopardy.

(9) The Petitioner was exposed to trial and verdict. He should not now be exposed a second time because:

(a) The prosecutor, the U. S. Government, was well aware of the defective indictment which was totally and legally incorrect.

(b) The Government intentionally resisted any attempt to have the indictment corrected, which would have been a simple matter to re-indict.

(c) The Petitioner was not responsible in any way in the manner in which the indictment was drawn and resisted being tried on such indictment.

(10) The duplicity of substantive offenses in one court is fatally defective to the Government case on retrial.

(11) The general verdict of guilty on the one count with two substantive charges:

(a) Does not reveal whether the jury found him not guilty of conspiracy and guilty of attempt to extort.

(b) Does not reveal whether the jury found him not guilty of attempt to extort and guilty of conspiracy.

(c) Does not disclose whether the jury was unanimous with respect to either count. (See page 4 of the Opinion of the Circuit Court of Appeals, which is attached hereto, made a part hereof and marked Exhibit "A"). Such a verdict was entered of record and did prejudice the petitioner in protecting himself against double jeopardy and in direct violation of the 5th Amendment to the U. S. Constitution.

(12) A shadow has now been cast over this one count indictment charging two substantive offenses which resulted in a verdict. A verdict as to what?

(a) The Government from the day of the indictment, pre-trial, trial and post trial has intentionally and deliberately resisted re-indictment.

(b) It was strongly urged by counsel that the Assistant U. S. Attorney, Kenneth Bravo, was proceeding illegally without foundation of law on this indictment.

(13) Petitioner, LARRY STARKS, should not be exposed a second time to trial of the same facts and issues already once raised.

(14) The conviction and/or acquittal under the first indictment and first trial is a bar to prosecution under the instant indictment which is the same as the first trial.

WHEREFORE, Petitioner, LARRY STARKS, respectfully requests the Bill of Indictment to be dismissed with prejudice because of double jeopardy and a violation of his constitutional rights under the 5th Amendment to the U. S. Constitution.

Respectfully submitted,

ZACK, MYERS AND ATKINSON

By: /s/ Jack M. Myers
JACK M. MYERS,
Attorney for Petitioner
LARRY STARKS

Filed June 5, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 74-133

(Title omitted in printing)

MOTION TO DISMISS THE INDICTMENT AND
IN ARREST OF JUDGMENT

Defendant Donald Abney, by his attorney, Joel Harvey Slomsky, Esquire, respectfully requests your Honorable Court to dismiss the above-captioned indictment for the following reasons;

1. The above-captioned indictment fails to charge a violation of 18 U.S.C. Section 1951.

Respectfully Submitted

/s/ Joel Harvey Slomsky
JOEL HARVEY SLOMSKY
Attorney for Defendant,
Donald Abney

Filed August 13, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 74-133

(Title Omitted in Printing)

MOTION TO DISMISS INDICTMENT

LARRY STARKS and ALONZO ROBINSON, defendants in the above action and movants herein, by their counsel, Ralph David Samuel and Thomas C. Carroll, hereby jointly move, pursuant to the Fifth and Sixth Amendments to the United States Constitution, F.R. Crim. P. 7 and 12, for an Order dismissing the above captioned indictment, and in support thereof assign the following reasons and grounds:

I. DOUBLE JEOPARDY

1. Trial of movants on the above captioned indictment will subject them to double jeopardy in violation of the Fifth Amendment to the United States Constitution.

II. INDICTMENT IS INSUFFICIENT UNDER F.R. CRIM.P. 7(c)(1)

2. That the indictment, following the "election" ordered by the United States Court of Appeals for the Third Circuit, is deficient with respect to constituting a "plain, concise and definite written statement of the essential facts constituting the offense charged", as required by F.R.Crim. P. 7(c)(1).

III. INDICTMENT DOES NOT CHARGE AN OFFENSE

3. That the indictment, following the election ordered by the United States Court of Appeals for the Third Circuit, does not charge an offense violating the laws of the United States.

4. Movants' memorandum of law is attached hereto and incorporated herein by reference.

Respectfully submitted,

/s/ Ralph David Samuel
RALPH DAVID SAMUEL
Attorney for Larry Starks

/s/ Thomas C. Carroll
THOMAS C. CARROLL
Attorney for Alonzo Robinson

Filed August 28, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 74-133

(Title Omitted in Printing)

EXCERPTS FROM TRANSCRIPT OF HEARING
Philadelphia, Pennsylvania
September 2, 1975

Before HON. DONALD W. VAN ARTSDALEN, J.

(Appearances Omitted in Printing)

[2] THE COURT: The next case that we have to take up is the case of United States v. Starks, Robinson and Abney.

Gentlemen, as I understand it, there has been filed on behalf of all three of the defendants by their respective counsel motions to dismiss the indictment on the grounds of the insufficiency of the indictment, the failure of the indictment to charge a federal offense, and on the grounds that a retrial at this time of the indictment will constitute double jeopardy.

All of those motions are denied.

As I read and understand the decision of the Third Circuit Court of Appeals on this case when it came before the Third Circuit, it was remanded back to this Court with certain rather explicit suggestions and instructions, including strong suggestions as to the manner in which the jury should be selected, and as to certain evidence

that might or might not be properly admissible on a retrial.

It is to me inconceivable that the Court would have gone to these lengths if it had felt that a retrial would in any way constitute a violation of the double jeopardy prohibitions. And although the Court may not have directly ruled on the question of the sufficiency of the indictment as directed by the Third Circuit to be limited upon a retrial, I think that it would be entirely inappropriate, in view of that decision, for the District Court to grant the motion of the defendants.

Therefore, those motions to dismiss are denied.

[3] It is my understanding that where a motion to dismiss on the grounds of double jeopardy is raised that that matter may be appealed before there is a trial and before there is any conviction, at least that is my interpretation of the case of United States v. Disilvio, slip opinion of the Third Circuit of July 17, 1975, at page 2 Note 2(a), slip opinion No. 75-1083.

I know of no way, however, that the question of the sufficiency of the indictment itself or the failure to charge a federal crime may be determined by the Third Circuit Court of Appeals until and unless there is a judgment of conviction. However, that is a matter for the Third Circuit to decide.

There was a suggestion I believe made by counsel that in the event I should deny these motions that I could certify the case under 28 United States Code Section 1292(b).

It is my understanding of that particular section that certification may only be made in a civil case, and I know of no right, perhaps counsel knows of something that I am unaware of, that would give the right to certify a question of law as to the sufficiency of an indictment to the Third Circuit for determination in the absence of a judgment of conviction. And, therefore, I will make no certification.

I would hope that the Third Circuit might address itself to this problem, but that is a matter, as I say, entirely for the Third Circuit, over which I have no control.

May I ask counsel representing the defendants what, in [4] view of my rulings they propose to do.

As I understand it, the case has been listed for trial this morning. As I understand it, the Government is ready to proceed to trial.

MR. SLOMSKY: If Your Honor please, may we approach the Bench for one second?

THE COURT: You may.

(Side-bar conference off the record.)

MR. CARROLL: If Your Honor please, on behalf of Alonzo Robinson, it is my intention to file notice of appeal with the Circuit Court, to take advantage of the Desilvio doctrine which allows us to appeal immediately from Your Honor's determination of denying our motion for dismissal on double jeopardy ground.

In that connection, Your Honor, I woud move for a stay of the trial for not more than 10 days pending the filing of notice of appeal, and if the notice of appeal is filed within that 10-day period the trial of the case be stayed until the final disposition by the Circuit Court of that issue.

Secondly, Your Honor, I would move the Court to extend the appointment of the Defender Association under the Criminal Justice Act to this appeal.

Thank you, sir.

THE COURT: All right.

Do other counsel have any statements they wish to [5] make?

MR. SLOMSKY: If Your Honor please, I would join in the motion made by Mr. Carroll on behalf of his client. That is, we intend to appeal also the denial of the motions.

I think for the record I would just on behalf of Mr. Abney move to join in the motions filed by Mr. Carroll and Mr. Samuel on behalf of Larry Starks and Alonzo Robinson. I raise different grounds in my motion to dismiss the indictment than on the grounds that they raised.

I specifically join in their motions and intend to move to appeal Your Honor's denial of all the motions.

I would also ask for a stay and intend to file a notice of appeal within 10 days.

THE COURT: Mr. Samuel.

MR. SAMUEL: Your Honor, I would join in the motions made by Mr. Carroll.

Additionally, I would suggest that, I believe that the rules provide for my appointment by the Circuit Court to represent Mr. Starks for and during the appeal, and I believe that appointment is actually considered a separate appointment from the present appointment, and I would move for a continuation of the present appointment until the time as this matter gets before the Court.

THE COURT: Thank you.

Gentlemen, as you know, the defendants have a right to a speedy public trial. There was originally a trial, the matter [6] was appealed and it is now back on remand from the Third Circuit.

Obviously, if an appeal is taken and if the stay is granted as requested by counsel it will cause a further considerable delay.

Before granting even a temporary stay of this matter I will require that the defendants fully understand they are giving up their right to a speedy trial in this regard, and that they specifically waive that right.

I think that counsel perhaps should confer with their clients about the matter and I will then ask the three defendants to come up here to the front of the court and be sure that they understand the rights that they are waiving by asking or consenting to a stay.

Gentlemen, if you will come up here, please, all three of you.

(The three defendants stand at the Bar of the Court.)

THE COURT: Gentlemen, as I indicated, you have a right under the Constitution to a speedy public trial. There is no specific time set forth in the Constitution as to within what period of time or what number of days that must be done. However, it is obvious that if there is an appeal filed in this matter at this time claiming that to retry you would be a violation of the prohibition against a person being twice put in jeopardy, it will cause a considerable delay. I don't know how long it was the

last [7] time from the time of the appeal until the case was remanded by the Court, but undoubtedly you gentlemen will recall better than I. I think that it was approximately a year, but I may be in error on that.

In any event, an appeal will undoubtedly cause some further delay.

Now, Mr. Abney, do you fully understand what I am saying?

DEFENDANT ABNEY: Yes, sir.

THE COURT: And do you agree and do you go along with the request that your attorney made that the matter be stayed, the trial, the retrial of this case be stayed until such time as the appellate court decides the issue?

DEFENDANT ABNEY: Yes, sir.

THE COURT: And do you specifically waive any right to a speedy trial in this regard?

DEFENDANT ABNEY: Yes, sir.

THE COURT: Mr. Robinson, do you understand what I have been saying?

DEFENDANT ROBINSON: Yes, sir.

THE COURT: And do you specifically waive any right to a speedy trial so far as any delay that may be caused in the event an appeal is taken?

DEFENDANT ROBINSON: Yes, sir.

THE COURT: And do you agree that the case not be [8] tried until after a decision by the Third Circuit?

DEFENDANT ROBINSON: Yes, sir.

THE COURT: And Mr. Starks, do you understand what I have said?

DEFENDANT STARKS: Yes, sir.

THE COURT: And do you waive any right that you may have to a speedy public trial insofar as any delay may be caused in the event that an appeal is taken and the matter stayed or not tried until after the appeal is decided?

DEFENDANT STARK: Yes, sir.

THE COURT: All right, gentlemen, you may step back.

Does the Government have any position it wants to take in this matter?

MR. BRAVO: No, Your Honor. I think the Court is correct. According to the Desilvio case the matter is appealable.

If there is anything any one of us has to say at this time it would be in a brief to the Court of Appeals.

THE COURT: As I have indicated—I don't know that I have to indicate it, but were this a matter that came before me initially in the first instance, I think that I might be inclined, I certainly would give very serious consideration to the possible claim of double jeopardy, but as I read the opinion of the appellate court in this case when it was up before it before, certainly it was anticipated that the District Court would retry the defendants and, therefore, I feel that I have no basis for [9] acting upon the motion beyond what I have done of denying the motions, and this applies to all motions pending to dismiss.

Gentlemen, is there any reason why you cannot file your application for appeal within a week?

MR. SLOMSKY: No, sir.

MR. CARROLL: No, sir.

THE COURT: We will stay the trial of this case for a period of one week pending defendants filing an appeal with the Third Circuit Court of Appeals.

In the event that an appeal is filed within one week the case will be stayed until a decision by the Third Circuit Court of Appeals, immediately after which a time for trial will be set in the event that the Circuit Court denies the appeal, denies it in a sense of denying the respective motions of the defendants.

The appointments heretofore made under the Criminal Justice Act of both the Public Defender and of Mr. Samuel to represent two of the defendants insofar as I have authorization to do so is continued, and they will continue to represent the defendants in this matter.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 75-2071/73

UNITED STATES OF AMERICA

v.

LARRY STARKS
CLARENCE LOUIS STARKS
JAMES TAYLOR, a/k/a LONZO HOWARD ROBINSON;
ALONZO ROBINSON
DONALD EVERETT ABNEY
MERRILL ALBERT FERGUSON

DONALD ABNEY, *Appellant* in No. 75-2071,
LARRY STARKS, *Appellant* in No. 75-2072,
ALONZO ROBINSON, *Appellant* in No. 75-2073.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal No. 74-133)

Submitted Under Third Circuit Rule 12(6)
February 9, 1976

Before: ALDISERT, GIBBONS and ROSENN, *Circuit Judges.*

JUDGMENT ORDER

After considering the contentions raised by appellants, to-wit, (1) that retrial is barred by the double jeopardy clause where the general verdict of guilty on a duplicitous indictment fails to disclose whether the jury found each defendant guilty of one crime or both; and (2) where the government elects to proceed to trial on the bare allegation of conspiracy the indictment fails to charge an offense; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

Circuit Judge

Attest:

/s/ Thomas F. Quinn
THOMAS F. QUINN, Clerk

DATED: Feb. 10, 1976

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 75-2071/2073

UNITED STATES OF AMERICA

v.

LARRY STARKS
CLARENCE LOUIS STARKS
JAMES TAYLOR, a/k/a LONZO HOWARD ROBINSON;
ALONZO ROBINSON
DONALD EVERETT ABNEY
MERRILL ALBERT FERGUSON

DONALD ABNEY, *Appellant* in No. 75-2071
LARRY STARKS, *Appellant* in No. 75-2072
ALONZO ROBINSON, *Appellant* in No. 75-2073

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*.

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Aldisert
Judge

Dated: March 5, 1976

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-6521

DONALD ABNEY, LARRY STARKS *and* ALONZO ROBINSON,
PETITIONERS

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Third Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 14, 1976

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